

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PAMELA PEMBERTON,

Plaintiffs,

v.

LONGS DRUG STORES CALIFORNIA,  
L.L.C.,

Defendant.

Case No. 1:20-cv-00568-NONE-EPG

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING THAT PLAINTIFF'S  
MOTION TO REMAND BE DENIED

(ECF No. 6)

Before the Court on referral from the District Judge (ECF No. 7) is plaintiff Pamela Pemberton's motion to remand this action to the Stanislaus County Superior Court. (ECF No. 9.) For the reasons that follow, the Court will recommend that the motion be denied.<sup>1</sup>

**BACKGROUND**

Plaintiff's complaint alleges the following: Plaintiff was hired by Defendant, Longs Drug Stores of California, currently doing business as CVS Pharmacy, in 1975. Her last-held title with Defendant was Operations Manager. (ECF No. 3-1 at 11.) Plaintiff injured her back while at work in one of Defendant's stores located in Oakdale, California. This injury limited Plaintiff's ability to work, and she was prescribed lifting restrictions for the injury, which Defendant granted.

In April 2015, Plaintiff was assigned to oversee a store remodel in Tracy, California. This assignment ended in July 2015. Plaintiff was not required to do any heavy lifting during this

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<sup>1</sup> The Court deems the motion suitable for decision without oral argument pursuant to Local Rule 230(g). (*See* ECF No. 12.)

1 assignment. (*Id.*) Plaintiff was then transferred to a store in Modesto, California, where she  
2 worked for approximately one year. During this time, her lifting restrictions were generally  
3 accommodated. (*Id.*)

4 In around November 2016, Plaintiff was transferred to a store in Riverbank, California.  
5 She was initially supervised by the store manager, Howard Hanes, and her disability was  
6 accommodated. However, Hanes left after about six months and was replaced by Joe Esquivel.  
7 While Esquivel was store manager, Plaintiff was routinely compelled to lift heavy objects and  
8 otherwise violate her work restrictions. This exacerbated Plaintiff's disability such that she was  
9 taken off work by her doctor in October 2017. (*Id.*)

10 Plaintiff applied for and was granted leave under the Family Medical Leave  
11 Act/California Family Rights Act. She also continued to request accommodation for her disability  
12 and supplied medical certification from her health care provider. This certification specified  
13 Plaintiff's work restrictions and noted that Defendant was not complying with the restrictions.  
14 (ECF No. 3-1 at 12.) Defendant continued to refuse to accommodate Plaintiff and failed to engage  
15 in a timely, good faith interactive process to determine reasonable accommodations. (*Id.*)

16 In April 2019, Plaintiff spoke with Tracy Sullivan, Defendant's Reasonable  
17 Accommodation Partner. Sullivan informed Plaintiff that Defendant would not extend her leave  
18 of absence. Plaintiff pointed out that her work restrictions were previously accommodated,  
19 emphasizing her desire for reasonable accommodations and not a continued leave of absence.

20 Plaintiff's employment was terminated May 2, 2019. (ECF No. 3-1 at 12.) On December  
21 20, 2019, Plaintiff requested that Defendant provide copies of her payroll and personnel records.  
22 Defendant did not comply with this records request. (*Id.*)

23 On January 24, 2020, Plaintiff filed her complaint in Stanislaus County Superior Court.  
24 (ECF No. 3-1 at 9.) In the complaint, Plaintiff raises state law claims against Defendant, including  
25 claims for disability discrimination, retaliation, failure to accommodate, failure to prevent  
26 discrimination and retaliation, and failure to produce personnel and payroll records upon request,  
27 all in violation of state law. (*Id.*) The complaint does not specify a particular amount of damages,  
28 but seeks compensatory, special, and general damages; punitive and/or exemplary damages;

1 statutory penalties; injunctive relief; statutory attorneys' fees and costs; prejudgment and  
 2 postjudgment interest; and "such other and further relief as the Court deems just and proper."  
 3 (ECF No. 3-1 at 17-18.)

4 The summons and complaint were served on Defendant on March 19, 2020. (ECF No. 3-1  
 5 at 3.) On April 20, 2020, Defendant removed the case to federal court pursuant to 28 U.S.C.  
 6 § 1446(b) on the basis of diversity jurisdiction, 28 U.S.C. § 1332. (ECF No. 1.) On May 18, 2020,  
 7 Plaintiff filed the pending motion to remand. (ECF No. 6.) Defendant filed an opposition on June  
 8 12, 2020. (ECF Nos. 8, 9.) Plaintiff filed a reply in support of remand on June 19, 2020. (ECF  
 9 No. 11.)

### 10 LEGAL STANDARD

11 A defendant in state court may remove a civil action to federal court so long as that case  
 12 could originally have been filed in federal court. 28 U.S.C. § 1441(a); *City of Chicago v. Int'l*  
 13 *Coll. of Surgeons*, 522 U.S. 156, 163 (1997). Thus, removal of a state action may be based on  
 14 either diversity jurisdiction or federal question jurisdiction. *City of Chicago*, 522 U.S. at 163;  
 15 *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Here, removal is based on diversity  
 16 jurisdiction.

17 In a diversity action, the removing defendant has the burden of establishing the amount in  
 18 controversy by a preponderance of the evidence. *Rodriguez v. AT & T Mobility Servs. LLC*, 728  
 19 F.3d 975, 977 (9th Cir. 2013). Jurisdiction is analyzed based upon the pleadings filed at the time  
 20 of removal without reference to any subsequent pleadings filed in the action. *Sparta Surgical*  
 21 *Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1213 (9th Cir. 1998).

22 The removal statute is strictly construed, and removal jurisdiction is to be rejected in favor  
 23 of remand to the state court if there are doubts as to the right of removal. *Nevada v. Bank of Am.*  
 24 *Corp.*, 672 F.3d 661, 667 (9th Cir. 2012); *Provincial Gov't of Marinduque v. Placer Dome, Inc.*,  
 25 582 F.3d 1083, 1087 (9th Cir. 2009) ("The removal statute is strictly construed against removal  
 26 jurisdiction."). The district court must remand the case "[i]f at any time before final judgment it  
 27 appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c); *see also*  
 28 *Smith v. Mylan, Inc.*, 761 F.3d 1042, 1044 (9th Cir. 2014); *Bruns v. Nat'l Credit Union Admin.*,

1 122 F.3d 1251, 1257 (9th Cir. 1997) (holding that remand for lack of subject matter jurisdiction  
2 “is mandatory, not discretionary”).

### 3 ANALYSIS

4 Plaintiff does not dispute that she and Defendant are citizens of different states but  
5 contends that the case must be remanded because Defendant has not met its burden of  
6 demonstrating that the amount in controversy exceeds the \$75,000 threshold of 28 U.S.C.  
7 § 1332(a). Plaintiff does not affirmatively state that the amount in controversy is less than  
8 \$75,000. Rather, Plaintiff asserts that remand is appropriate because Defendant has provided a  
9 “mere averment” that the amount in controversy exceeds \$75,000, and that this is insufficient.  
10 Plaintiff contends that, to meet its burden, Defendant is required to provide summary judgment-  
11 type evidence demonstrating by a preponderance of the evidence that the amount in controversy  
12 exceeds \$75,000. (ECF No. 6 at 2; ECF No. 11 at 2.)

13 To the extent Plaintiff is challenging Defendant’s petition for removal, the challenge fails  
14 as Defendant was not required to submit evidence at that stage of the proceedings. Rather, “a  
15 defendant’s notice of removal need include only a plausible allegation that the amount in  
16 controversy exceeds the jurisdictional threshold,” and “the defendant’s amount-in-controversy  
17 allegation should be accepted when not contested by plaintiff or questioned by the court.” *Dart*  
18 *Cherokee Basin Operating, Co. v. Owens*, 574 U.S. 81, 87, 89 (2014).

19 Here, the petition and notice of removal alleges that the complaint, on its face,  
20 “contemplates a matter in controversy that exceeds the sum or value of \$75,000, exclusive of  
21 interest and costs.” (ECF No. 1.) The petition and notice goes on to set forth the basis of this  
22 assertion, stating that if plaintiff prevailed, lost wages alone would be more than \$144,000 based  
23 on the case taking 25 months from the date of removal to resolve. (ECF No. 1 at 6-7.) This is  
24 sufficient for purposes of the removal petition.

25 Once a plaintiff contests the defendant’s allegations in support of removal, “removal ... is  
26 proper on the basis of an amount in controversy asserted” by the defendant only “if the district  
27 court finds, by the preponderance of the evidence, that the amount in controversy exceeds the  
28 jurisdictional threshold.” *Dar Cherokee*, 574 U.S. at 88; 28 U.S.C. § 1446(c)(2)(B). “In such a

1 case, both sides submit proof and the court decides, by a preponderance of the evidence, whether  
2 the amount-in-controversy requirement has been satisfied.” *Id.* “Discovery may be taken with  
3 regard to that question. In case of a dispute, the district court must make findings of jurisdictional  
4 fact to which the preponderance standard applies.” *Id.* at 88-89.

5 Here, Plaintiff is contesting Defendant’s allegations regarding the amount in controversy.  
6 Thus, the question before the Court is whether Defendant has submitted evidence sufficient to  
7 demonstrate it is more likely than not that, if Plaintiff prevails on all of her claims, total damages  
8 and attorneys’ fees will exceed \$75,000. *See Narayan v. Compass Grp. USA, Inc.*, 284 F. Supp.  
9 3d 1076, 1089-90 (E.D. Cal. 2018) (“Defendant must prove that the amount in controversy is  
10 ‘more likely than not’ to exceed the jurisdictional minimum.”) (citation omitted).

11 “Wholly conclusory allegations as to the amount in controversy are insufficient, and the  
12 court cannot base [its] jurisdiction on a [d]efendant’s speculation and conjecture.” *Id.* at 1090  
13 (citations and quotation marks omitted) (alterations in original). “Nonetheless, [t]he burden is not  
14 daunting, and ‘a removing defendant is *not* obligated to research, state, and prove the plaintiff’s  
15 claims for damages.” *Id.* (citations and quotation marks omitted) (emphasis and alteration in  
16 original).

17 In *Narayan v. Compass Grp. USA, Inc.*, as here, the plaintiff contested the defendant’s  
18 allegations that the amount in controversy was met. Thus, the burden was on the defendant to  
19 establish by a preponderance of the evidence that the amount-in-controversy requirement was  
20 met. 284 F. Supp. 3d at 1090. The plaintiff in *Narayan* also asserted that the defendant was  
21 required to provide summary judgment-type evidence to establish that the amount in controversy  
22 requirement was satisfied. *Id.* at 1090. The court rejected that assertion:

23 Here, however, the question is less whether Defendant made a plausible allegation—he  
24 has—than it is what happens now that Plaintiff has contested the amount. *Dart Cherokee*,  
25 as both parties point out, explains that § 1445(c)(2)(B) authorizes the submission of  
26 evidence by both parties once “plaintiff contests, or the court questions, the defendant’s  
27 allegations.” Plaintiff contends that Defendant is therefore “required to provide ‘summary  
28 judgment type evidence’ to establish that the amount in controversy is met.” Pl.’s Mem.  
Supp. Mot. Remand, ECF No. 16, 3:19. Not so. First, as Defendant points out, Plaintiff  
fails to assert that he is seeking less than \$75,000. Second, the evidence currently before  
the Court is sufficient to ascertain whether the amount in controversy is satisfied.

*Id.*

1 In the present case, Plaintiff also asserts that Defendant must submit summary judgment-  
2 type evidence to meet its burden of demonstrating the amount in controversy requirement is met.  
3 As *Narayan* states, “Not so.” 284 F. Supp. 3d at 1090. First, as in *Narayan*, Plaintiff does not  
4 affirmatively assert that she is seeking less than \$75,000. Second, the evidence submitted by  
5 Defendant is sufficient to ascertain that the amount-in-controversy requirement is satisfied here.

6 “In measuring the amount in controversy, a court must assume that the allegations of the  
7 complaint are true and that a jury will return a verdict for the plaintiff on all claims made in the  
8 complaint.” *Korn v. Polo Ralph Lauren Corp.*, 536 F.Supp.2d 1199, 1205 (E.D. Cal. 2008)  
9 (citation omitted). “The ultimate inquiry is what amount is put ‘in controversy’ by the plaintiff’s  
10 complaint, not what a defendant will *actually* owe.” *Id.* (citation omitted).

11 Further, “the amount in controversy is not limited to damages incurred prior to removal—  
12 for example, it is not limited to wages a plaintiff-employee would have earned before removal (as  
13 opposed to after removal).” *Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413, 414 (9th Cir.  
14 2018). “Rather, the amount in controversy is determined by the complaint operative at the time of  
15 removal and encompasses all relief a court may grant on that complaint if the plaintiff is  
16 victorious.” *Id.* at 414-15.

17 Defendant has demonstrated that the amount-in-controversy requirement is met here.  
18 Defendant has submitted what is represented to be a true and correct copy of Plaintiff’s employee  
19 profile maintained in the regular course of business as a business record. (ECF No. 3 at 2, ECF  
20 No. 3-3.) This employee profile includes a history of Plaintiff’s hourly wages from 2009 to her  
21 termination in May 2019. (ECF No. 3-3.) Her hourly rate at the time of her termination in May  
22 2019 was \$23.15. (*Id.*)

23 Defendant has also submitted statistical information from the Administrative Office of the  
24 United States Courts Federal District Court Management Statistics showing that as of  
25 December 31, 2019, the median time from filing a civil action to trial is 32.2 months in the  
26 Eastern District of California. (ECF No. 9 at 2; ECF No. 9-1.)

27 Based on this evidence, Defendant has calculated estimated lost wages of approximately  
28 \$173,000. This calculation is based on Plaintiff’s last hourly rate of \$23.15 per hour, for a rate

1 \$926 per week multiplied by 187 weeks. The 187 weeks is the amount of time between Plaintiff's  
2 termination (May 2019) and the estimated date on which trial would be completed (December  
3 2022). The estimated date on which trial would be completed is, in turn, based on the median  
4 time of 32.2 months that it takes from filing a civil action in the Eastern District to final  
5 disposition through trial.<sup>2</sup> (ECF No. 8 at 7.) The Court finds this calculation to result in a  
6 reasonable estimate of lost wages damages. Because this amount alone satisfies the amount-in-  
7 controversy requirement, Defendant has met its burden and the motion to remand should be  
8 denied.<sup>3</sup>

9 In her reply brief, Plaintiff contends that the information provided by Defendant is  
10 insufficient to meet its burden. First, Plaintiff contends that there is no indication of the number of  
11 hours Defendant used to reach its total weekly rate of \$926 for Plaintiff's wages. (ECF No. 11 at  
12 4.) However, a simple calculation demonstrates that the number of hours used by Defendant is 40  
13 hours per week (\$23.15 per hour x 40 hours per week = \$926).

14 Second, Plaintiff challenges Defendant's use of the statistical information regarding the  
15 median time it takes for a case to proceed through trial. Plaintiff argues that use of the median  
16 length of time is conclusory as this median represents cases that range from complex class actions  
17 with "multiple plaintiffs and multiple defendants (which can take years to litigate) to very simple,  
18 single-plaintiff, single-defendant actions," such as the present one. (*Id.* at 6.) Plaintiff thus argues  
19 that "these statistics do not necessarily indicate that Plaintiff's case will take 32.2 months." (*Id.*)

20 Although the Court agrees that the statistics do not *necessarily* indicate that Plaintiff's  
21 case will take 32.2 months, the Court notes that the median is merely a method to estimate how

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22 <sup>2</sup> In the removal petition, Defendant inadvertently used the statistics from the Northern District of  
23 California, which shows a median time from filing to trial of only 25 months, and thus calculated  
lost wages at only \$144,000. (ECF No. 1 at 6-7; ECF No. 3 at 3-4.)

24 <sup>3</sup> Defendant also calculated estimated attorneys' fees. Specifically, Defendant estimated that  
25 Plaintiff's counsel would spend 60 hours on pre-trial fact discovery, 15 hours on pre-trial expert  
26 discovery, 40 hours preparing for trial, and 45 hours attending a 5-day jury trial, for a total of 160  
27 hours. (ECF No. 8 at 8-9.) Based on the \$455 that Mr. Briscoe represented as his hourly rate in a  
28 previous case, Defendant estimated attorneys' fees in the amount of \$72,800. Thus, attorneys'  
fees alone would almost meet the amount in controversy requirement without considering any  
damages. Because the Court finds the amount-in-controversy requirement met based only on lost  
wages, the Court need not consider estimated attorneys' fees.



1 long this case might take to proceed to trial, and that Plaintiff's case could take even longer than  
2 the median to go to trial. It is also worth noting that Plaintiff does not propose an alternative  
3 method of estimating the length of time that this case might take to proceed through trial.<sup>4</sup>

4 The Court finds Defendant's use of the median from the Eastern District statistics to be a  
5 reasonable method of estimating the length of time it will take for this case to proceed through  
6 trial and thus a reasonable method to use to calculate estimated lost wages. Moreover, even if this  
7 case would proceed through trial in half the median time—which is highly unlikely in light of the  
8 judicial emergency currently facing the Eastern District<sup>5</sup>—the lost wages would be approximately  
9 \$108,000,<sup>6</sup> and thus would still satisfy the amount in controversy requirement.

10 Third, Plaintiff argues that Defendant has not demonstrated that Plaintiff will still be  
11 unemployed in May 2002, three years after her termination. (ECF No. 6.) However, as Defendant  
12 points out, this is a potential affirmative defense for mitigation of damages. A “potential defense  
13 does not reduce the amount in controversy for purposes of establishing federal jurisdiction.”  
14 *Perez v. Alta-Dena Certified Dairy, LLC*, 647 F. App'x 682, 684 (9th Cir. 2016); *Jackson v.*  
15 *Compass Grp. USA, Inc.*, 2019 WL 3493991, at \*4 (C.D. Cal. July 31, 2019) (“mitigation of  
16 damages is an affirmative defense,” which “does not reduce the amount in controversy,” and is  
17 “therefore not relevant to the Court's determination of the amount in controversy”).

18 Finally, Plaintiff argues in her reply brief that Defendant has not provided evidence  
19 demonstrating the number of hours per week that Plaintiff worked and whether she worked the  
20 same hours every week. (ECF No. 11 at 4.) The Court is unpersuaded by this new argument.  
21 Plaintiff does not claim that she worked less than 40 hours per week, but simply asserts that  
22 Defendant has not proved the number of hours she did work. Moreover, Plaintiff was on notice at  
23 the time she filed her motion to remand that Defendant had calculated her wages at \$926 per

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24 <sup>4</sup> The Court also notes that Plaintiff could have but did not raise this argument in her opening  
25 brief, instead arguing there that Defendant used the statistics from the wrong district. (ECF No.  
26 6.)

27 <sup>5</sup> (See ECF No. 4-1, Standing Order discussing judicial emergency in the Eastern District of  
28 California.)

<sup>6</sup> This is based on a trial of August 2021, which results in 27 months, or 117 weeks between the  
May 2019 termination and trial. At \$926/week, lost wages would be approximately \$108,000.



1 week as that amount was set forth in Defendant's removal petition. (*See* ECF No. 1 ("Her hourly  
2 rate was \$23.15 (approximately \$926 per week)".) Despite this, Plaintiff did not take issue with  
3 that amount in her opening brief. (ECF No. 6.) Instead, Plaintiff challenged Defendant's use of  
4 outdated statistics from the Northern District in estimating the length of time for the case to go  
5 through trial. Only in her reply brief does she raise an argument regarding the number of hours  
6 she worked each week (and thus her weekly wages), thereby depriving Defendant of the  
7 opportunity to rebut the argument.

8 The Court finds that it is reasonable to assume that Plaintiff worked 40 hours per week.  
9 Further, the Court notes that even if she worked on average only 30 hours per week, making her  
10 average weekly wages \$694, the amount in controversy would still be met: her estimated lost  
11 wages, based on the shorter time frame of 16.1 months from filing to trial (117 weeks from  
12 termination to trial) would be approximately \$81,000 (\$694 x 117 weeks); and based on the more  
13 realistic longer time frame of 32.2 months from filing to trial (187 weeks from termination to  
14 trial) would be approximately \$129,778.

### 15 CONCLUSION

16 For the reasons set forth above, the Court recommends that Plaintiff's motion for remand  
17 (ECF No. 6) be DENIED.

18 These findings and recommendations will be submitted to the United States district judge  
19 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen  
20 (14) days after being served with these findings and recommendations, the parties may file  
21 written objections with the Court. The document should be captioned "Objections to Magistrate  
22 Judge's Findings and Recommendations."

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1 The parties are advised that failure to file objections within the specified time may result  
2 in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014)  
3 (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).  
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5 IT IS SO ORDERED.

6 Dated: July 24, 2020

7 /s/ Eric P. Gray  
8 UNITED STATES MAGISTRATE JUDGE  
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